

## HUMAN SERVICES BOARD

# INTRODUCTION

The Department is charged under the LEP Policy to provide language assistance to individuals with limited English proficiency so they have meaningful access to Agency programs. This case illustrates some of the difficulties for

both individuals and Department personnel in the Department's provision of LEP services.

The following decision is based upon testimony adduced from hearings on September 27, 2007; October 11, 2007; and November 15, 2007; exhibits, and subsequent briefing by the parties.

FINDINGS OF FACT

1. Petitioner, his wife, and seven children are Somali refugees. The petitioner and his wife were not educated in Somalia; they are not literate in the Somali language. They also have limited English proficiency.

2. Petitioner and his family moved to Vermont in July 2006 from Maine. Petitioner relocated to Arizona in approximately March 2007. His family joined him at the end of August 2007.

3. This case involves an overpayment of Food Stamp benefits for the months of February through June 2007. The Department calculated an overpayment of \$921. The Department sent petitioner a Notice of the overpayment on or about August 23, 2007 alleging that the overpayment was caused due to inadvertent household error. Petitioner's wife requested a fair hearing on or about August 23, 2007 disputing the

overpayment. The Association of Africans Living in Vermont (AALV) was noted as the petitioner's representative.

4. The Department learned that petitioner was working at a job he started in February 2007 through an employment hit (computer match) during the beginning of June 2007. Petitioner had not reported the employment. Petitioner's understanding of his reporting requirements will be addressed below.

5. The petitioner received services through the Department's Burlington District Office (BDO).

6. Petitioner's hearing commenced on September 27, 2007. Petitioner was represented by an AALV representative, J.W. Neither petitioner nor his wife participated. C.C., eligibility specialist, was petitioner's case worker and provided partial testimony. Petitioner's representative raised the defense that petitioner did not understand what his Food Stamp reporting requirements were due to lack of adequate interpretation. The hearing was continued to October 11, 2007 with the proviso that petitioner would be present by telephone and there would be interpreter services.

7. The hearing reconvened on October 11, 2007. Petitioner was represented by AALV's executive director, G.W., and J.W. was present. Petitioner participated by

telephone. A Maay Maay interpreter was present by telephone through a telephone interpreter service.<sup>1</sup> During the hearing, G.W. requested a continuance and asked for discovery from petitioner's case file. The request was granted.

8. The hearing reconvened on November 15, 2007. At this hearing, AALV identified Somali as the petitioner's original language.<sup>2</sup> Petitioner participated by telephone. A Somali interpreter was present at the hearing. At the close of the hearing, a briefing schedule was set up.

9. Petitioner was assigned to C.C.'s caseload during July 2006. Petitioner had moved from Maine where his family had received assistance. C.C. did not do the petitioner's initial eligibility interview. She has no first hand knowledge whether an interpreter was used at the initial eligibility interview. There is a July 13, 2006 note in the Case Action notes from another eligibility specialist that Somali interpreters are needed.

Refugees are given the option of naming an alternate recipient and having a copy of their mail sent to the

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<sup>1</sup> The Department has a contract with a telephone interpreter service including interpreters on immediate notice.

<sup>2</sup> This was the first indication by AALV to the hearing officer that Somali rather than Maay Maay is the original language for petitioner. No objection had been made to the use of a Maay Maay interpreter at the October 11, 2007 hearing. There was no testimony that petitioner was unable to participate through the use of a Maay Maay interpreter.

alternate recipient. When petitioner first received services from the Department, his mail was sent to the Vermont Refugee Resettlement Program (VRRP). Petitioner designated VRRP as an alternate recipient or address. Once petitioner's mail went directly to him, copies of correspondence to petitioner were sent to VRRP. All correspondence sent to petitioner from the Department was in English.

10. C.C. testified that she was unaware that petitioner was employed until she received information from the fraud office in early June 2007. She then made efforts to learn petitioner's income for July to determine their current eligibility. At the September 27, 2007 hearing, C.C. did not remember petitioner's country of origin or his original language. At a later hearing, she recalled that the Department had Maay Maay listed as the petitioner's language.

11. During the hearings, C.C. explained how she handles a family's Food Stamp eligibility interviews. C.C. sees applicants for their initial Food Stamp eligibility determination. Food Stamp recipients have their cases redetermined every six months unless there is a change in their situation that would necessitate an earlier review. The Food Stamp eligibility questionnaire/booklet asks

recipients about their income and sets out their reporting requirements. These forms are all in English.

For recipients who have limited English proficiency, interpreters are made available who interpret the questions, answers, and information in the forms. C.C.'s practice is to circle the question number as she asks the question and then circle the response. The February 2007 forms used to redetermine petitioner's eligibility show that C.C. conformed to her practice. The February 2007 forms were signed by petitioner and his wife.

12. According to C.C.'s supervisor, P.H., petitioner's language was listed in their records as Maay Maay and they used Maay Maay interpreters through the VRRP when communicating with petitioner. (As will be more fully set out below, professional interpreters were not used in every contact with petitioner or his wife.) Maay Maay is the original language of Somali Bantus; it is an oral language.

13. It was difficult for C.C. to reconstruct when interpreters were used with petitioner because the use of interpreters was not recorded for all contacts. Interpretation was hit or miss in petitioner's case.

The forms and letters used in petitioner's case were written in English. When C.C. scheduled some of the

appointments, she would telephone petitioner's household and set up an appointment with a family member for a time when an interpreter would be available; the scheduling calls were not interpreted. At least one telephone call involved a minor child. In addition, there was testimony of occasions when petitioner or his wife would directly contact the Department or come in without an appointment. Interpretation did not occur with all these contacts.

There was a notation in petitioner's records about a "private interpreter" who was identified as petitioner's eighteen year old son. According to C.C. and P.H., petitioner asked to have his son interpret on occasion, and C.C. recalled two occasions when the son was used. The Department accedes to requests from recipients to use private interpreters such as family members.

15. The following written records from C.C. document the relationship of the petitioner with the Department from C.C.'s perspective:

- a. September 5, 2006. "Client did not understand that he needs to apply for RUFA, I called phone interpreter because he could not understand when I gave him the appl form. He did not want to leave and did not understand VRRP referral also"
- b. September 5, 2006. "I got phone interp, who explained that [petitioner] could see me on Sept 18...He was not happy with the result of coming in today, left

unhappy with appt date...it was suggested that he get help in filling out the application. I got the impression that he felt that was not reasonable, that he wanted money to pay rent and utils today. I said I would speak to the LL if he gave me the number. I had to ask [petitioner] to leave and he was reluctant to do so and blocked my door but eventually went out the door."

c. November 2, 2006. "[petitioner] pounced on me in the hallway as I was going to lunch with jacket on. He chases me down the hall. I told him no, I am going to lunch. He then glares at me as I drove to get my lunch. When I returned to my desk I found that he had left me a single paystub. I had specifically asked for employment form in my letter to him..."

d. November 9, 2006. "[petitioner] was here today, confused, handed in two blank employment forms..."

e. February 13, 2007. "I attempted to do review with [petitioner] but I could not understand what he is saying. Asked him to come today at 1 when interpreter can help him fill out the forms and then I will meet with him at 3. He argued and got loud in the hallway, guard came and he left. He understood, he just did not want to do it, demanded FS now. I have never been able to convey to him about how we can help with the review and so he does not do it and so this time I would like to involve the interpreter so we have fewer problems in future."

The above records document the petitioner's confusion about what he needed to do regarding his responsibilities to the Department and how to interact with the Department. They document that there were gaps in the use of interpreter services. In addition, they document C.C.'s frustrations and



the growing problems in her work relationship with petitioner.<sup>3</sup>

16. Both C.C. and P.H. testified that they have attended Department trainings on the LEP policies.

17. Petitioner testified that he was confused by the Food Stamp requirements and that he thought he was in compliance.

#### ORDER

The Department's decision to assess an overpayment of Food Stamps is affirmed, in part. The Department's decision that the overpayment is due to inadvertent household error is reversed. Consistent with this decision, the Department should recalculate the overpayment as agency error and compromise the resulting overpayment by 50 percent.

#### REASONS

This case arose from a Food Stamp overpayment. The amount of Food Stamps a household receives is based upon a complex formula that takes into account the household's earned and unearned income. Food Stamp Manual (FSM) § 273.9.

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<sup>3</sup>C.C. testified that she was frightened by the petitioner based on her perception of petitioner's demeanor and behavior.

When a household does not timely report changes in their income, the household may be overpaid Food Stamps. In cases where a household has been overpaid Food Stamps, the Department is required to establish a claim whether the Food Stamp overpayment is due to agency error or inadvertent household error. FSM § 273.18(a).

Although the Department is required to establish a claim, the reason for the overpayment does matter. For example, the 20 percent earned income deduction used in calculating the correct amount of Food Stamps is not used in cases of inadvertent household error. In addition, the Department's policy for compromising overpayments differs based on the reasons for the overpayment.

Petitioner argues that his overpayment should be treated as agency error because he did not understand the Food Stamp requirements due to the Department's failure to follow the Limited English Proficiency (LEP) Policy.

The root of the LEP Policy is found in Title VI of the Civil Rights Act of 1964 which states at 42 U.S.C. § 2000d:

No person in the United States shall on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

See 45 C.F.R. § 80.3. See Lau v. Nichols, 414 U.S. 563 (1974).

Title VI applies to state agencies receiving federal funds such as the Agency of Human Services and its constituent Departments and programs. In particular, Title VI applies to the Department in its administration of RUFA, Food Stamps, Medicaid, and other programs.

The federal government recognized that Title VI's designation of national origin applied to individuals who have limited English proficiency as these individuals cannot meaningfully access or participate in programs such as Food Stamps without adequate interpretation services and without adequate translation of written materials.

Executive Order Number 13,166 was first issued in August 2000 and amended in August 2003; Executive Order Number 13,166 required federal agencies to develop implementing guidelines. The federal Agency of Health and Human Services (HHS) issued policy guidance for the states; the most recent guidelines are found at Federal Register Vo. 68, No. 153 (August 8, 2003).

HHS Policy Guidance recognizes that there is no "one size fits all" solution to providing LEP services. Factors include the size of each community served, the type of

program, resources, frequency of contacts, etc. The goal is, in part, effective communication by the Department to individuals so individuals can effectively access programs including an understanding of the administration of programs, the requirements of the programs, and the information needed by the Department for benefit determinations. The goal is, in part, to give individuals the means to effectively communicate with the Department so they can share pertinent information.

Moreover, the HHS policy addresses the use of friends or family members as interpreters because the use of friends or family members can compromise effective interpretation as they may not be sufficiently proficient in both languages to effectively interpret or they may not understand the terminology used in agency program. The policy states:

If after a recipient/covered entity informs an LEP person of the right to free interpreter services, the person declines such services and requests the use of a family member or friend, the recipient/covered entity may use the family member or friend, if the use of such a person would not compromise the effectiveness of services or violate the LEP person's confidentiality. The recipient/covered entity should document the offer and declination in the LEP person's file. Even if an LEP person elects to use a family member or friend, the recipient/covered entity should suggest that a trained interpreter sit in on the encounter to ensure accurate interpretation.

To implement Title VI, the Vermont Agency of Human Services (AHS) adopted a LEP policy on September 1, 2003 and then revised the policy on September 27, 2006. The LEP policy highlights three types of services; in-person interpretation, telephonic interpretation, and written translation of materials. Staff training is integral to the policy. In addition, the policy recognizes the need to reassess and inform staff of how best to serve LEP persons.

Looking at petitioner's case, implementation of the Department's policies did not lead to effective communication between the petitioner and the Department. The caseworker's notes paint a picture detailing petitioner's lack of understanding of both how to interact with the Department and different program requirements. These notes include documentation:

- a. from September 5, 2006 that petitioner did not understand his need to apply for cash benefits;
- b. from October 2, 2006 that petitioner left a single pay stub rather than an employment form referenced in an English language letter sent to petitioner. There is no indication that the letter had been interpreted for petitioner;
- c. from October 9, 2006 that petitioner was confused; and
- d. from February 13, 2007 about the caseworker's inability to convey information to the petitioner.

During the six month period referenced above, communication between the petitioner and the Department remained problematic. In addition, the petitioner corroborated these communication problems through his testimony that he did not understand the Food Stamp requirements.

In addition, interpreters were not used consistently. Case files did not document each time interpreters were used nor did they document if free interpretation was offered when the petitioner asked to have his son interpret. The availability of telephone interpreter services allows for immediate access to an interpreter.

Providing LEP services can be difficult. The caseworker acted in good faith based on her understanding of the requirements. The gap appears to come from the guidance given Department staff.<sup>4</sup>

However, the evidence shows that the Department did not adequately apply the LEP policy in this case. As a result, the overpayment should be considered agency error rather than inadvertent household error. The actual amount of the

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<sup>4</sup>Both the caseworker and her supervisor were questioned about LEP training but neither was able to provide any details about their training.

overpayment should be recalculated to take into account applicable deductions.

Further, the Department can compromise Food Stamp overpayments. There are two alternative methods.

First, FSM § 273.18(e)(7) allows compromise if "the household's economic circumstances dictate that the claim will not be paid in three years". See P-2540B4. There is no evidence that the overpayment cannot be repaid within three years.

Second, the Department offers an alternative procedure that offers the following compromise in agency error cases<sup>5</sup>:

DCF will compromise 50 percent of agency error claims. Additionally, it will compromise the remaining 50 percent if:

1. the client is the only person legally liable for the claim; and
2. the client is 65 years or older, or the client is terminally ill.

Based on this alternative, petitioner's overpayment would be halved.

Although the Department first considers compromise pursuant to P-2450B4, the Department will apply the alternative procedure if that procedure would provide a

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<sup>5</sup> Petitioner attached to his brief a December 7, 2007 letter from the Department setting out the two options.

greater benefit to the individual. Accordingly, petitioner's overpayment should be halved.

The petitioner argues that his overpayment should be reduced to zero because the Department did not correctly apply the LEP policy in his case. The Food Stamp Act specifically mandates the imposition of an overpayment whether the overpayment is caused by agency error or inadvertent household error or fraud. 7 U.S.C. § 2022, 7 C.F.R. § 273.18. Petitioner has provided no legal basis for his argument that Title VI vitiates the specific provision of the Food Stamp Act and his argument to nullify the overpayment is unavailing.

Based on the foregoing, the Department's decision to assess an overpayment is affirmed, in part. The Department's decision to categorize the overpayment as inadvertent household error is reversed. The case is remanded for the Department to recalculate the overpayment as agency error and to compromise the resulting overpayment by 50 percent. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 17.

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